84-601

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1984

WHEELING PITTSBURGH STEEL CORPORATION,
Petitioner,
v.
DOUGLASS M. DUFFY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL A. MANION
(Counsel of Record)
LAURA A. CANDRIS
MANION ALDER & COHEN, P.C.
600 Grant Street, Fifth Floor
Pittsburgh, Pennsylvania 15219
(412) 391-6400
Counsel for Petitioner, Wheeling-Pittsburgh Steel Corporation

64pp

The Petitioner, Wheeling-Pittsburgh Steel Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 10, 1984. Over a vigorous dissent by Judge Adams, the panel majority (Garth, J. and Cohen, D.J.) affirmed a non-jury decision of the district court, ruling that petitioner violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., when in May 1980, as part of a 15% reduction in force necessitated by declining economic conditions in the steel industry, it terminated the employment of respondent Douglass M. Duffy. The panel majority also upheld the district court's order that petitioner reinstate Duffy to his former position as a salesman.

QUESTION PRESENTED

In May 1980, economic necessity forced a steelmaker to implement a drastic 15% reduction in its sales force. The employer selected for termination, among others, a salesman whose superiors unanimously testified was a mediocre performer. The employer's testimony was corroborated by several annual written evaluations of the salesman made before any of the events which gave rise to his termination. The question presented is whether the district court (whose decision was affirmed on appeal over a strong dissent) committed fundamental legal error in ruling that the employer's business justification for its decision was a pretext for age discrimination because the court disagreed with the company's judgment and found certain inconsistencies in the employer's evidence on matters which were not probative of discriminatory treatment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 7

I. This Case Presents A Question Of Exceptional Importance Concerning The Proof Required To Support A Finding Of Intentional Age Discrimination In The Context Of An Economically-Motivated Reduction In Force 7

II. The District Court's Pretext Ruling Was Based Upon A Misapprehension Of Its Judicial Function And Upon Evidence Which Was Legally Insufficient To Support It 8

III. The District Court's Credibility Determinations Were Legally Irrelevant To Its Pretext Ruling 11

IV. None of The Other Findings Cited By The Panel Majority Support The District Court's Pretext Determination 13

CONCLUSION 17

APPENDICES:

A. Opinion of the United States Court of Appeals for the Third Circuit, July 10, 1984 ..... 1a

Page

B. Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, September 30, 1983 ..... 25a

C. Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing, August 17, 1984 ..... 41a

D. Order of the United States Court of Appeals for the Third Circuit staying issuance of the certified judgment in lieu of formal mandate, August 27, 1984 ..... 42a

TABLE OF AUTHORITIES

CASES

Page

Ackerman v. Diamond Shamrock Corp.,
670 F.2d 66 (6th Cir. 1982) 11

Berkowitz v. Allied Stores of Penn-Ohio, Inc.,
541 F.Supp. 1209 (E.D.Pa. 1982) 15

Cova v. Coca-Cola Bottling Co.,
574 F.2d 958 (8th Cir. 1978) 13

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 3

Hays v. Republic Steel Corp.,
12 FEP Cases 1640 (N.D.Ala. 1974),
rev'd in part on other grounds,
531 F.2d 1307 (5th Cir. 1976) 13

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 3

Parcinski v. Outlet Co.,
673 F.2d 34 (2d Cir. 1982),
cert. denied, 103 S.Ct. 725 (1983) 11

Raggett v. Foote Mineral Co.,
16 FEP Cases 1771 (M.D.Tenn. 1975) 15

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) 3

White v. University of Massachusetts,
26 FEP Cases 1672 (D.Mass. 1981) 15

STATUTES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1343 2
29 U.S.C. § 621 ..... i, 1
29 U.S.C. § 623(a)(1) 1

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is officially reported at 738 F.2d 1393 and appears in Appendix A. The memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania is unofficially reported at 33 FEP Cases 730 and appears in Appendix B. The decision of the court of appeals denying rehearing is unreported and appears in Appendix C. The order of the court of appeals, pursuant to Fed.R.App.P. 41(b), staying issuance of the certified judgment in lieu of formal mandate until October 15, 1984 to permit the filing of a petition for a writ of certiorari in this Court, appears in Appendix D.

JURISDICTION

The opinion of the court of appeals was filed on July 10, 1984. A timely petition for rehearing was denied on August 17, 1984, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves an action brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), which forbids an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.* § 623(a)(1).

STATEMENT OF THE CASE

This is a single plaintiff action under the ADEA which arises from a 15% reduction in force (the "RIF") in the commercial department of petitioner Wheeling-Pittsburgh Steel Corporation ("W-P Steel") in May 1980.[1] The RIF had been ordered as an emergency measure by Dennis J. Carney, W-P Steel's Chairman and Chief Executive Officer, in response to a precipitous drop in the company's sales caused by a severe decline in the American steel market. (A.129)[2] Prior to the RIF, W-P Steel had employed forty-five salesmen in its commercial department. (A.228) Ten of these positions were eliminated in the RIF. (A.251) In the Philadelphia office alone, the employment of two of the three salesmen was terminated. One of these salesmen was respondent Douglass M. Duffy ("Duffy"), who was then age 59; the other was Hubert P. Sweeney, age 32. Since the RIF, adverse market conditions have forced W-P Steel to implement still greater cutbacks in its commercial department. Thus, as of the date of trial, W-P Steel had only 26 or 27 salesmen on its payroll, a 40% reduction from its pre-RIF complement of salesmen. (A.251)

Duffy contended that he was the victim of age discrimination in that younger salesmen had been retained in the RIF. In particular, he complained about the retention of John McCongely, age 26, who was the only one of the three Philadelphia salesmen not terminated. At the close of respondent's case at trial, the district court ruled that Duffy

---

[1]The basis for federal jurisdiction in the district court was 28 U.S.C. § 1343.

[2]All references to "A" are to the Appendix to the briefs of the parties in the court of appeals.

had made out a prima facie case under the standards established by this Court in its *McDonnell Douglas-Furnco-Burdine* trilogy[3] and then gave W-P Steel an opportunity to present evidence showing that Duffy's age was not a determinative factor in the decision to terminate him. To rebut the respondent's minimal prima facie case, W-P Steel offered uncontradicted evidence showing that the decision to terminate Duffy was compelled by economic necessity and the company's own assessment of his comparative job performance.

The testimony established that Chairman Carney issued the 15% emergency restructuring order in March 1980 in response to the threat to W-P Steel's survival posed by the deteriorating American steel market and the company's own rapidly declining sales. (A.86) Frank M. McElhinney, General Sales Manager—Eastern Division, was responsible for making the recommendations for the reorganization of the three-man Philadelphia office, which covered Eastern Pennsylvania, Delaware and New Jersey. McElhinney believed that two able and aggressive salesmen could handle this large territory by themselves, so that one sales position in the Philadelphia office could be eliminated. He recommended that both Duffy and Sweeney be let go while the remaining salesman, McConegly, be retained. (A.234-38) McConegly had led the Philadelphia office in sales in 1979. (A.325) it was also decided that Ronald R. Ryan, age 48, whose position as Special Products Manager at W-P Steel's headquarters in Pittsburgh was being eliminated in the RIF, should be assigned as the second salesman in the reorganized Philadelphia office.

---

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Ryan had previously been District Sales Manager in Philadelphia and, before that, he had compiled an excellent record as a salesman there. (A.239-40) Even after his reassignment as a Philadelphia salesman due to the RIF, Ryan received a larger salary than had Duffy. (A.24, 329)

In making his RIF recommendations, McElhinney did not consult any of the company's district sales managers, but (like the other general managers) relied instead upon his own assessment of the salesmen's abilities. He was thoroughly familiar with the three salesmen's performance as a result of his personal observations of them in the field; his study of the sales reports and district manager evaluations submitted for his review; and his continuous dialogue over the years with the district sales managers and product managers at headquarters. (A.235, 240-42) Based on this cumulative information, McElhinney judged all three salesmen as competent, but rated McConegly as the best and Duffy as the least suited for the expanded duties that would be required of the two remaining salesmen in the streamlined post-RIF Philadelphia office. In particular, McElhinney considered Duffy to be the least innovative and aggressive salesman, and he was especially concerned by Duffy's demonstrated lack of preparation on calls, lack of initiative, lack of territorial coverage, and failure to bring in many new accounts. (A.156, 234-238)

All management personnel shared McElhinney's comparative assessment of Duffy and McConegly. Cornell Bolog, Vice President-Commercial, also considered Duffy to be a marginal performer (A.110-111, 114) and Clyde Shelton, the Philadelphia District Manager who was Duffy's immediate supervisor and friend, rated him no better than average. (A.284)

An objective review of Duffy's career at W-P Steel fully accounts for the unanimous judgment among Duffy's superiors that he was expendable in the RIF because he had never exhibited the work qualities that W-P Steel now demanded of its employees because of declining economic conditions. As summarized by Judge Adams in his dissent from the Third Circuit panel decision:

> To rebut Duffy's *prima facie* case, W-P [Steel] came forward with evidence that for 25 years, Duffy had been no more than an adequate salesman. Duffy's performance did not affect his job status until the deterioration of the steel market forced a drastic streamlining of operations.
>
> When he was discharged in May 1980, Duffy was a "line salesman," the same position he had held since beginning with W-P [Steel] in 1955. He had received only three "merit increases" in pay during his 25-year tenure, the last of which was awarded in 1970. During the last four years when salesmen in the Philadelphia District received written evaluations (1974-77), *see* App. at 308, Duffy was reported to be "well liked" by his customers and coworkers, but lacking in "follow up," "creative effort," "self start[ing]," "aggressive[ness]," "planning," "initiative," "in depth selling," "territory coverage," and "volume of work." *See* App. at 340-47. Described as "complacent" and criticized for the "few accounts [he] handled," App. at 344, Duffy was rated in every report as having no potential for advancement. *See* App. at 340-47. Duffy's immediate supervisor [Shelton] testified that Duffy's job performance showed no substantial change through 1980 and that the reports accurately describe Duffy's work. *See* App. at 291, 206-11.

(App. A at 18a) In contrast to Duffy's lackluster record, Ronald Ryan, the man who was chosen to fill the second salesman's position in Philadelphia, had amassed nine merit increases and three promotions during his twenty-four year career with W-P Steel. (A.24) As for McConegly, he had already impressed McElhinney during his one and one-half years in the Philadelphia office as a very competent, aggressive and sharp salesman (A.234) and he had proven his ability by leading the Philadelphia office in sales in 1979. (A.325) Significantly, Clyde Shelton, the Philadelphia District Manager, did not disagree at all with the decision to retain McConegly and discharge Duffy. (A.182-83, 202-04)

Faced with this uncontroverted record, the district court offered only two reasons for its finding that the company's assessment of Duffy's abilities at the time of the RIF was a pretext for willful age discrimination: (1) management's business judgment did not comport with the district court's own evaluation of Duffy's comparative job performance as "above average" (App. B at 35a); and (2) there were "inconsistencies" in the testimony of management personnel concerning certain events surrounding the RIF. *(Id.)* On these grounds alone, the district court entered judgment in the sum of $225,058.07 in favor of Duffy; ordered that W-P Steel reinstate him to his former position as a salesman; and directed further proceedings on the issue of attorneys' fees, costs and expenses.

On appeal, and over a vigorous dissent by Judge Adams, the Third Circuit panel majority deferred to the district court's ruling under the "clearly erroneous" standard of Fed.R.Civ.P. 52(a). (App. A at 6a) W-P Steel submits that the panel majority decision sets an ill-advised precedent which will have serious repercussions for future

employers forced by economic necessity to institute similar workforce reductions.

REASONS FOR GRANTING THE WRIT

I. This Case Presents A Question Of Exceptional Importance Concerning The Proof Required To Support A Finding Of Intentional Age Discrimination In The Context Of An Economically-Motivated Reduction In Force

As Judge Adams cogently points out in his dissent, the legislative history of the ADEA supports the view that the evidence of pretext in an age discrimination case should be evaulated with much greater care than in a Title VII case involving the suspect categories of race or sex. (App. A at 11a-17a) To find pretext here, however, the district court relied on evidence that does not even remotely suggest that W-P Steel treated Duffy differently than any other employee—older or younger—in making its RIF determinations. Instead, the district court substituted its own (erroneous) assessment of Duffy's job performance for that of the company's management, and engaged in a dissection of alleged inconsistencies in the testimony presented by petitioner which were irrelevant to the pretext issue. The district court thus substituted its own business judgment for that of W-P Steel's management and, in so doing, mistook its disagreement with management as proof of willful age discrimination. By placing its imprimatur on this type of unwarranted intrusion into the sphere of business judgment legitimately reserved for management, the panel majority decision sets an unwise precedent that will effectively strait-jacket future employers faced with the need to effect similar cutbacks.

Petitioner emphasizes that the ultimate decision in this case will have enormous consequences throughout the country inasmuch as changing economic conditions continue to compel numerous employers, particularly in our basic industries, to reduce their workforces. As Judge Adams astutely observed: "Given the urgent national importance of this process of reorganizing the steel industry into a leaner, more efficient form, the courts should not—absent statutory or constitutional command—interfere with the difficult choices better suited to a business executive than to a federal judge." (App. A at 11a) Rather than give W-P Steel a fighting chance to cut costs and remain competitive, however, the courts below have wrongfully interfered with the company's good-faith exercise of its business judgment and have saddled it with a double damage award and an order of reinstatement. Indeed, the reinstatement order upheld by the panel majority underscores the importance of this issue since the evidence is undisputed that W-P Steel's continued economic decline has resulted in even further reductions to its salesforce.

II. The District Court's Pretext Ruling Was Based Upon A Misapprehension Of Its Judicial Function and Upon Evidence Which Was Legally Insufficient To Support It

The main ground for the district court's pretext ruling was its frankly startling finding that Duffy's job performance was "above average" (App. B at 35a), and in fact "superior" to that of McConegly, the younger salesman who was retained. (*Id.* at 30a). Not only is this finding directly at odds with the testimony of every one of Duffy's superiors at W-P Steel, but it flies in the face of Duffy's mediocre 25-year career record and the written evaluations

made by Duffy's immediate supervisor throughout the period 1974-77, before the RIF was contemplated. Significantly, the district court (and the panel majority) did not even mention these written evaluations which consistently criticized Duffy for his inadequate volume of work and lack of initiative. (A.340-347) As the panel majority itself recognized (App. A at 7a), the *only* evidence cited in support of the district court's finding is P.Ex. 19, a cryptic listing of the steel shipments credited to the various sales representatives in the Philadelphia office:

	1979	1980
Duffy (age 59)	52,576	17,889 (½ year)
Sweeney (age 32)	46,690	19,944 (½ year)
McConegly (age 26)	75,458	36,672

By relying on this chart as the sole "objective criteria" of performance (App. B at 29a), the courts below misapprehended the judicial function in an age discrimination case in a way that will thwart the efforts of future employers forced to reduce their workforces while trying to retain their most productive employees.

In the first place, without any record evidence indicating its business significance, the shipment chart is meaningless and misleading. For example, as Judge Adams observed in castigating "the inherent unreliability of this chart in its current, unexplained form" (App. A at 19a-20a, n.7), P.Ex. 19 gives no indication of the number of long-established major accounts contributing to each salesman's total, nor does it show how many new accounts were developed each year. In addition, the chart reveals nothing about the amount of difficulty involved in making any particular sale. In short, the chart provided no basis whatsoever for the district court to find that Duffy was better

suited to meet W-P Steel's needs in the difficult post-RIF period than was McConegly.[4]

The choice that W-P Steel was forced to make between Duffy and McConegly called for an informed business judgment that balanced Duffy's long lackluster record against McConegly's demonstrated performance. This was a choice for management, and management alone, to make. Yet the district court compounded its mistaken reliance on the sales chart as providing the sole criteria for evaluating Duffy's job performance by completely discounting (not discrediting) McConegly's outstanding performance and management's laudatory evaluations of him. The district court ruled, apparently as a matter of law, that McConegly's performance was "at best an unknown quantity, McConegly having only been a salesman for a year and a half." (App. B at 30a)

---

[4]Indeed, if anything, the chart suggests that W-P Steel wisely chose to retain McConegly over Duffy inasmuch as the sales attributed to McConegly in 1979 were 150% greater than those attributed to Duffy. There is no evidence that, contrary to the figures shown on P.Ex. 19, Duffy's 1979 sales actually were higher than McConegly's. The testimony referred to by the panel majority (App. A at 7a, asterisked portion of the chart) to the effect that McConegly was credited with a large account which he was not personally responsible for developing was *not* cited by the district court as support for its finding, even though this explanation for discounting the apparent significance of McConegly's tonnage sales was suggested in Duffy's proposed findings of fact. Instead, as explained within, the district court simply chose to disregard McConegly's excellent performance on the inexplicable grounds that he had not been employed by W-P Steel long enough for the company to form an accurate estimation of his abilities. Furthermore, Duffy did not present any evidence concerning the specific sales made by McConegly or whether such sales were not properly attributed to McConegly in accordance with the company's standard business practices. *See generally* Judge Adam's discussion of the chart, App. A at 19a-20a, n.7.

Clearly, the fact that McConegly was not a long-time employee was a consideration for management's judgment, not the district court's, and management unanimously considered McConegly the best Philadelphia salesman just as it considered Duffy the worst. But the district court patently substituted its own judgment as to W-P Steel's business needs for that of W-P Steel's management, as though it were the function of the court in an age discrimination case to sit as a super-board of directors judging the wisdom of corporate business decisions. *See, e.g., Parcinski v. Outlet Co.*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). Worse yet, in ruling that the company was not permitted to take McCongely's excellent performance into account when evaluating its employees at the time of the RIF, the court held in effect that the law required W-P Steel to retain Duffy in the one remaining salesman's position, despite his proven mediocrity, and instead terminate McConegly. In short, the pretext ruling in this case was based, not upon evidence of discrimination, but upon the court's *a priori* determination that a company should not be allowed to retain a younger employee who has demonstrated his capabilities over an older employee who demonstrably lacks the job qualities essential to the company's survival.

III. The District Court's Credibility Determinations Were Legally Irrelevant To Its Pretext Ruling

Aside from the shipment chart in P.Ex. 19, the only other evidence cited by the district court in support of its pretext finding were some alleged inconsistencies in the testimony presented by W-P Steel. As Judge Adams observed, however, these supposed inconsistencies are "as a matter of law, not relevant to Duffy's pretext claim"

because none are probative of discriminatory treatment. (App. A at 20a). Thus W-P Steel does not propose that there should be *de novo* review of the district court's credibility determinations. Instead, its concern here is purely legal—viz., what types of evidence are legally sufficient to show pretext. By the same token, W-P Steel does submit that the district court's legal error should not be perpetuated, as it was by the panel majority, under the guise of the clearly erroneous standard of review. (App. A at 8a-9a)

First, the district court found it "not credible" that one of management's reasons for not consulting with Duffy's immediate supervisor, Shelton, prior to the RIF was its fear of putting Shelton in the difficult position of trying to protect his district or his employee friends. (App. B at 35a-36a). But credibility is not at issue here, because the district court failed to mention the uncontradicted evidence that *no* sales manager, including Shelton, was consulted during the RIF decision-making process. (A. 240-42). Hence, the failure to consult Shelton cannot support a finding of pretext, because there simply can be no claim that Duffy was treated differently than any other terminated employee, younger or older.

Most of the other "inconsistencies" relied upon by the district court to support its pretext determination related to its findings that Duffy and Shelton were told only that Duffy was being terminated for economic reasons and not also informed that performance played a part in his selection in the RIF. (App. B at 36a). Here again, the "inconsistencies" relied upon by the district court are non-existent and do not support its pretext ruling. W-P Steel has never disputed the fact that "but for" the reduction in force compelled by declining sales, Duffy would have been retained despite his comparatively poor employment

record. However, the testimony was clear that top management did consider economic necessity as good cause for termination in the RIF. (A. 98-99). Thus, the explanation given to Duffy was true. Duffy was not terminated for poor performance *per se,* but because of the company's economic need to streamline its operations.

Furthermore, W-P Steel's failure to communicate the entire basis for its termination decisions suggests nothing more than the company's natural reluctance to add insult to injury by pointlessly telling Duffy, or other employees terminated during the RIF, that performance was a key factor in the loss of their particular jobs. *See, e.g., Hays v. Republic Steel Corp.*, 12 FEP Cases 1640, 1648 (N.D.Ala. 1974), *rev'd in part on other grounds,* 531 F.2d 1307 (5th Cir. 1976); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). As Judge Adams stated (App. A at 21a), absent some evidence suggesting that Duffy's termination was handled differently than that of the younger terminated salesmen, the evidence cited by the district court is legally irrelevant to a finding of pretext.[5]

IV. None Of The Other Findings Cited By The Panel Majority Support The District Court's Pretext Determination

Although not cited by the district court in support of its pretext determination, the panel majority cited two other findings in the district court's general discussion as

---

[5]Nor is the fact that McElhinney was unable some three years after the events in question to recall the particulars of Duffy's performance in the nine months prior to his termination probative of pretext. As Judge Adams pointed out, this is not at all suprising in view of McElhinney's position as General Manager of W-P Steel's entire Eastern Division, which included the Philadelphia District as only one of its sales regions. (App. A at 22a).

bolstering its decision. First, it cited the district court's finding that "[o]f the five salesmen and one assistant sales manager in Duffy's district, [Wheeling-Pittsburgh] terminated the four oldest and most highly paid salesmen." (App. A at 6a) However, both the district court and the panel majority failed to mention:

(1) that one of the four oldest terminated salesmen, Sweeney, was only 32 (App. A at 7a);

(2) that another, McCutcheon, was terminated solely because W-P Steel closed out its resident sales office in Charlotte, North Carolina, and eliminated the salesman position in that city (A. 232-33, 275, 280-81);

(3) that another, Mickle, was an assistant district sales manager who was replaced by a 50-year-old demoted district sales manager, Edward C. Fredericks (A. 161-62, 328);

(4) that the single vacancy created by Sweeney's and Duffy's terminations was filled by a man within the protected age class (A. 100-102, 239-40);

(5) that none of these terminated salesmen was replaced by anyone outside of the protected age class (A. 233-34, 239-40, 248-49, 328);

(6) that Ryan, even after two salary reductions, earned more than Duffy (A. 24, 329);

(7) that the evidence established no correlation whatsoever between salary and age or between salary and termination[6]; and

---

[6]Thus, P. Ex. 44 shows that only one of W-P Steel's ten most highly paid salesmen was demoted or terminated during the RIF, and that, with two exceptions, those ten most highly paid salesmen were considerably younger than Duffy. (A. 338).

(8) that the plaintiff's own evidence established that the average salary of defendant's salesmen did not decline after the RIF but, in fact, increased. (Compare A. 338 with A. 339).

Even more importantly, as Judge Adams pointed out, the "impact" finding relied upon by the majority is devoid of probative value because of its lack of statistical significance—and the district court so ruled. (App. A at 22a-23a)

The panel majority also cited deposition testimony of another salesman, William Shutt, who stated that Bolog told him: "They were going to have to cut back in the Sales Department and were anxious to get younger and more aggressive people in the field." (App. A at 8a) The fact that the panel majority gave prominent display to this isolated, ambiguous and second-hand remark underscores the lack of any real evidence of discriminatory treatment in this case. But even taking Shutt's testimony at face value, the deposition transcript clearly shows that he was merely testifying as to his own interpretation of Bolog's paraphrased remarks (A. 215), and he testified that his own termination was due to W-P Steel's economic condition and not to his age or any desire of the company to hire younger personnel. (A. 218-19) Furthermore, even assuming Bolog made the comment attributed to him by Shutt—which he denied (A. 122-23)—the evidence is clear that Bolog did not select or recommend Duffy for termination but merely approved McElhinney's recommendation. (A. 86). Absent a causal connection between such a comment and the decision to terminate, this testimony is not probative of discrimination. *See White v. University of Massachusetts,* 26 FEP Cases 1672 (D. Mass. 1981); *Raggett v. Foote Mineral Co.,* 16 FEP Cases 1771 (M.D. Tenn. 1975); *see also, Berkowitz*

v. Allied Stores of Penn-Ohio, Inc., 541 F.Supp. 1209 (E.D.Pa. 1982).

In summary, none of the findings cited by the district court or the panel majority support the inference that W-P Steel's business reasons for including Duffy in its reduction in force were a pretext for age discrimination. In the words of Judge Adams:

> "Nowhere in the district court's opinion or in the record is there any evidence suggesting that the negative evaluations of Duffy should not be trusted. Nowhere is there any evidence suggesting that W-P [Steel's] management did not in fact believe that Duffy was only a minimally adequate salesman. To support a finding of pretext, Duffy should have been required to come forward with more than evidence of careless communications and forgetfulness." (App. A at 22a).

The practical consequences of the district court's decision, as approved by the panel majority, can have but one effect, namely, to stifle the painful but essential restructuring efforts that are being undertaken by many American industrial enterprises in an attempt to regain economic viability. The adverse impact of judical intermeddling in these difficult business judgments is especially apparent in this case. Here, the district court chose to disregard McConegly's exceptional performance solely because he had been on the job "only" for a year and a half. Instead, it ordered the company to reinstate Duffy, whose employment record plainly discloses that he lacks the initiative, aggressiveness and capacity for taking on more work that W-P Steel must now demand of its salesman if it is to survive in a declining marketplace.

W-P Steel fully appreciates the personal misfortune that befalls an employee—young or old—who loses his job

in a RIF. But where, as here, economic reality dictates that some jobs must be eliminated if the company is to survive and provide jobs for others, and there is no evidence of disparate treatment in making the RIF determination, the courts should not find age discrimination in a misguided attempt to spare one man's job.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Third Circuit.

Respectfully submitted,

PAUL A. MANION
(Counsel of Record)
LAURA A. CANDRIS

MANION ALDER & COHEN, P.C.
600 Grant Street, Fifth Floor
Pittsburgh, Pennsylvania 15219
(412) 391-6400

*Counsel for Petitioner**

Dated: October 10, 1984

*Pursuant to Supreme Court Rule 28.1, Petitioner advises the Court that it has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

APPENDIX A

United States Court Of Appeals For The Third Circuit

No. 83-1776

DUFFY, DOUGLASS M.,
Appellee

v.

WHEELING PITTSBURGH STEEL CORP.,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. CIVIL NO. 81-0601

Argued January 26, 1984
Before: Adams, Garth, *Circuit Judges*
and Cohen, *District Judge**

(Opinion Filed July 10, 1984)

PAUL A. MANION (Argued)
MANION, ALDER
& COHEN, P.C.
600 Grant Street,
Fifth Floor
Pittsburgh, PA 15219
Attorney for Appellant

JOHN B. LANGEL (Argued)
BALLARD, SPAHR, ANDREW
& INGERSOLL
30 South 17th Street
20th Floor
Philadelphia, PA 19103
Attorney for Appellee

*Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

GARTH, *Circuit Judge:*

Plaintiff Douglass Duffy brought suit against his former employer, Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (1975) ("ADEA").[1] The district court held that Wheeling-Pittsburgh's discharge of Duffy violated the ADEA, based on the court's findings that Duffy had established a prima facie case of age discrimination and that Wheeling-Pittsburgh's proffered reason for discharging Duffy was a "mere pretext." The questions presented on this appeal are (1) whether the district court applied proper legal precepts in holding that a pretextual justification is equivalent to a finding of intentional discrimination under the ADEA; and (2) whether the district court's finding that Wheeling-Pittsburgh's justification for discharging Duffy was a pretext was clearly erroneous. We affirm, holding that there was no error of law and the district court's findings of fact were not clearly erroneous.

I.

Duffy had been employed as a salesman in the Philadelphia district office of Wheeling-Pittsburgh and its predecessor company from 1955 until 1980 when Wheeling-Pittsburgh terminated his employment as part of a 15% reduction in work force necessitated by weak economic conditions in the steel industry. Duffy was 59 years of age when his employment was terminated. Prior to May, 1980,

---

[1]The ADEA makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a)(1).

there were six salesmen in the Philadelphia district.[2] Wheeling-Pittsburgh terminated the four oldest and most highly paid salesmen, including Duffy.

II.

We address first Wheeling-Pittsburgh's argument that the district court misapplied legal standards in finding intentional discrimination. In order to recover under the ADEA, a plaintiff must prove by a preponderance of the evidence that age was "a determinative factor" in the employer's decision. *See Smithers v. Bailar,* 629 F.2d 892 (3d Cir. 1980); *see also Lewis v. University of Pittsburgh,* 725 F.2d 910 (3d Cir. 1983)(applyiing same standard in Title VII context). Duffy need not prove that age was the employer's sole or exclusive consideration but must prove that "age made a difference" in that decision. *Smithers,* 629 F.2d at 898.

---

[2]Prior to the May, 1980 discharges, the Philadelphia district consisted of the following six salesmen: in the Philadelphia office—Duffy (age 59, discharged), Sweeney (age 32, discharged), and McConegly (age 26, retained); in the Atlanta office—Mickle (age 53, discharged); in the Charlotte office—McCutcheon (age 61, discharged); and in the Richmond office—Walker (age 23, retained). In its reply brief and at oral argument, Wheeling-Pittsburgh argued that the court should have looked at the personnel decisions involving only the Philadelphia office, not the entire Philadelphia district. Wheeling-Pittsburgh, however, did not make this argument in the district court, and the district court accordingly framed its finding in terms of the entire Philadelphia district. We will not consider arguments raised for the first time before us. *E.g.,* Houghton v. American Guaranty Life Ins. Co., 692 F.2d 289, 294 (3d Cir. 1982.)

We note that even if we did consider the personnel changes in the Philadelphia office, Duffy would still have established a prima facie case, by proof that he was discharged while McConegly, a younger employee, was retained.

The district court first determined, under the guidelines of *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) and *Smithers*, 629 F.2d at 895, that Duffy had established a prima facie showing of age discrimination. A plaintiff alleging a discriminatory layoff need show only that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied* 104 S. Ct. 348 (1983).[3] Wheeling-Pittsburgh does not challenge the finding that Duffy established a prima facie case.

After a plaintiff has established a prima facie case of age discrimination, the burden shifts to the defendant to dispel the adverse inference by articulating "some legitimate, nondiscriminatory reason for the employee's rejection." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978); *Massarksy*, 706 F.2d at 118; *Smithers*, 629 F.2d at 895. Once the defendant satisfies the requirement of articulating a non-discriminatory reason for the employee's discharge, the ultimate burden remains with the plaintiff to prove to the trier of fact that the defendant intentionally discriminated against the plaintiff. *Burdine*, 450 U.S. at 252-53; *Lewis*, 725 F.2d 910.

---

[3]Because Duffy's complaint concerned a reduction in force, it obviously was unnecessary for him to follow the literal terms of the *McDonnell Douglas* model and show that he was actually replaced by a younger employee. In *McDonnell Douglas*, the elements of the plaintiff's prima facie case were articulated in the context of an alleged discriminatory failure to hire. The Supreme Court made clear that the nature of the required showing depends on the circumstances of the case. *Massarsky*, 706 F.2d at 118; *see* 411 U.S. at 802 n.13; *see also* Teamsters v. United States, 431 U.S. 324, 358, (1977); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert denied*, 455 U.S. 943 (1982); Jackson v. U.S. Steel Corp., 624 F.2d 436. 440 (3d Cir. 1980) (Title VII case).

Wheeling-Pittsburgh argues that the district court made an error of law by focusing on "pretext" and relieving Duffy from having to prove an actual discriminatory intent. However, under the *McDonnell Douglas* test, a showing that a proffered justification is pretextual is itself *equivalent* to a finding that the employer intentionally discriminated. As stated by the Court in *Burdine*, after the plaintiff has established a prima facie case and the defendant has articulated a nondiscriminatory reason for the challenged action, the plaintiff's burden of showing prextext "merges with the ultimate burden of persuading the Court that [the employee] has been the victim of discrimination. [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. *See also United States Postal Service Bd. of Governors v. Aikens*, 103 S. Ct. 1478 (1983); *Massarksy*, 706 F.2d at 118-19; *Behlar v. Smith*, 719 F.2d 950, 952 (8th Cir. 1983).

Here, the district court properly applied the standards of *Burdine*. Contrary to the suggestion found in the dissent that a difference exists between the proofs required in an ADEA case and those required in a Title VII case (*see* Dissent, typescript at p. 9), the district court properly followed our established precedent. *See Smithers*, 629 F.2d at 892. It noted that "the fact that an employer can demonstrate that an employment decision was based upon sound business reasons will not preclude liability under the ADEA if the employee can prove, nevertheless, that (1) a discriminatory reason more likely motivated the employer or (2) the employer's proffered explanation is unworthy of

credence." Thus, the district court applied proper legal precepts.

III.

We next consider whether the district court's finding of pretext or intentional discrimination was clearly erroneous. In the instant case, after Duffy established his prima facie case, Wheeling-Pittsburgh proffered a legitimate nondiscriminatory reason for Duffy's discharge that (1) economic conditions in the steel industry forced a cutback in personnel, and (2) Duffy was selected for termination based on relative job performance. The district court noted in its opinion that if Wheeling-Pittsburgh's explanation were true, it would adequately rebut any inference of discrimination.

The district court, however, concluded that "defendant's articulated nondiscriminatory reason for the discharge of plaintiff's performance [sic] was pretextual. Accordingly, the Court finds that plaintiff was discharged on the basis of his age in violation of the ADEA." *Duffy v. Wheeling-Pittsburgh Steel Corp.*, Civ. No. 81-601, mem. op. at 12, (E.D. Pa. Sept. 30, 1983); App. at 359. We must defer to this finding unless it is "clearly erroneous." Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). We are satisfied that more than adequate evidence exists to support the district court's finding.

The district court found that "[o]f the five salesmen and one assistant sales manager in [Duffy's] district, [Wheeling-Pittsburgh] terminated the four oldest and most highly paid salesmen." *Duffy*, mem.op. at 7; App. at 365. They were paid "substantially higher salaries than the younger men retained, and the cost of their insurance, pensions and social security payments was greater." *Id.*

The district court also found that Duffy's performance "was superior to that of the younger men retained." *Duffy*, mem. op. at 6; App. at 364. This finding was based on the following evidence relating to the tonnage sold by each salesman employed by Wheeling-Pittsburgh at the time of Duffy's discharge.[4]

PHILADELPHIA DISTRICT
SHIPMENT BY SALES REPRESENTATIVE

		Age	1977	1978	1979	1980
	Office		16,192	17,468	22,410	47,413
†	Jack Mickle	53	0	19,252	40,992	15,340
	Clyde Shelton	46	9,955	17,536	16,867	45,692
	John McConegly	26	0	0	75,458*	36,672
	Rich Walker	23	0	0	1,857	9,571
†	Lynn McCutcheon	61	0	7,727	12,494	3,082
†	Doug Duffy	59	25,819	51,602	52,575	17,899**
†	Patrick Sweeney	32	31,403	33,209	46,690	19,944

† Discharged

* Duffy introduced uncontradicted testimony showing that this figure included a large, unique account which was credited to McConegly's record although the transactions occurred through the Pittsburgh office, without McConegly's participation. McConegly did not have that account in 1980, where the chart indicates that Duffy had a higher monthly sales average than McConegly.

** reflects half-year.

The district court also took note of a statement made in May of 1980 by Cornel Bolog, commercial vice-president of Wheeling-Pittsburgh, to William Shutt, age 59, who was discharged along with Duffy. According to

[4] *See Duffy*, mem. op. at 6; App. at 364 (reference to employees not employed at time of Duffy's discharge omitted).

Shutt's deposition, Bolog gave Shutt the following reasons for his discharge: "They were going to have to cut back in the Sales Department and were anxious to get younger and more aggressive people in the field." App. at 366.

Moreover, the district court also found that Wheeling-Pittsburgh's explanations and testimony were internally inconsistent and not credible. It is not our function to review the inconsistencies in the evidence and determine what testimony is to be credited. That function is one which is to be discharged, as the district court did here, by the trial judge. To argue, therefore, as does the dissent, that credit should have been given to witnesses from Wheeling-Pittsburgh when the district court explicitly declined to credit that testimony not only blurs the distinction that has been established between the district court and the appellate court provinces, but also would require in every instance our *de novo* review of the trial court's credibility determinations, even assuming that such review were feasible.

Bolog stated that the key factor in deciding which salesmen to terminate was performance and that each person being terminated was to be informed as to the cause of his termination. Wheeling-Pittsburgh originally claimed that Bolog, Frank McElhinney, general manager, and Clyde Shelton, Duffy's immediate supervisor, made the decisions on whom to fire. McElhinney's testimony, however, revealed that Shelton was not consulted about Duffy's performance, even though Shelton was the most qualified to assess Duffy's performance. The district court found that McElhinney did not request any input from Shelton, and Shelton made no recommendation. Indeed, Shelton testified that Duffy's performance had not been evaluated since 1977, that neither McElhinney nor Bolog

had reviewed any of Duffy's evaluations, and that the two younger salesmen retained in the Philadelphia district had never been evaluated before May of 1980.

Duffy himself testified that he was repeatedly informed that his discharge was due to economic reasons only. According to Duffy, this reason was provided by Nicholas Weldon, vice-president for personnel, who told Duffy that the discharge was unrelated to his performance. Based on the testimony of both Duffy and Clyde Shelton, Duffy's direct superior, the district court determined that only after Duffy filed his complaint did Wheeling-Pittsburgh for the first time assert that Duffy was selected for termination based on comparative performance.

As a whole, therefore, the evidence lends credence to the district court's inference that the alleged "poor performance" was a contrived story created by Wheeling-Pittsburgh after the fact. Because Wheeling-Pittsburgh's testimony and explanations were found not to be credible, they did not weigh against the evidence adduced by Duffy which supported the finding of pretext. Thus, the district court's finding of intentional discrimination cannot be held to be clearly erroneous. We therefore conclude that Duffy has carried his required burden.

IV.

Finally, Wheeling-Pittsburgh claims that the district court's order reinstating Duffy to his position was an abuse of discretion. Wheeling-Pittsburgh contends that reinstatement would create unreasonable hardship by forcing enlargement of the staff in the Philadelphia district. However, "[v]ictims of discrimination are entitled to be

restored to the economic position they would have occupied but for the intervening unlawful conduct of employers. *Rodriguez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978). The district court concluded that Duffy's reinstatement would not present unconscionable difficulties for Wheeling-Pittsburgh. Our review of the record supports that conclusion. We, therefore, find no abuse of discretion in the manner by which the district court fashioned a remedy to cure the act of discrimination for which it found Wheeling-Pittsburgh responsible.

V.

The judgment of the district court dated September 30, 1983 will be affirmed.

ADAMS, *Circuit Judge,* dissenting.

It is a lamentable fact that when a failing company undertakes a reduction-in-force, loyal employees frequently lose their jobs because of economic forces wholly beyond their control. This is especially distressing when the laid-off employee is an older worker, who often encounters a particularly unreceptive employment market. Nonetheless, we cannot ignore the fact that the American steel industry, perhaps more than any other basic industry in this country, faces substantial threats to its survival. Alongside the sharply reduced demand of United States automakers for steel, competition from highly efficient producers in Japan, Western Europe and the developing countries has steadily increased. In these circumstances, American steel companies such as Wheeling-Pittsburgh (W-P) have been confronted with the painful task of eliminating the least productive elements of their operations, including, unfortunately, the least productive employees.

Given the urgent national importance of this process of reorganizing the steel industry into a leaner, more efficient form, the courts should not—absent statutory or constitutional command—interfere with the difficult choices better suited to a business executive than to a federal judge.

To my mind, the majority today affirms a misapplication of the ADEA and thereby permits an unwarranted intrusion on the reorganization of an economically battered company. In analyzing Douglass Duffy's discharge, the district court erred both by overlooking the critical distinctions between the ADEA and Title VII and by relying on evidence that does not support a finding of "pretext" at the third step of the test prescribed by *McDonnell Douglas v. Green*, 411 U.S. 892 (1973). While I am deeply concerned about the difficulties faced by Duffy, as well as other similarly situated older workers in this country, I do not think that he has made out a case for relief under the ADEA. I therefore respectfully dissent.

I.

The language of the ADEA makes it clear that Congress did not intend that the statute provide a general remedy for unemployment among older workers. Rather, Congress appears to have viewed the ADEA as aimed narrowly at the arbitrary use of age as a proxy for lack of ability. Thus the ADEA's statement of findings and purpose focuses on the problems of "arbitrary age limits regardless of potential for job performance" and the need "to promote employment of older persons based on their ability rather than age." 29 U.S.C. §§ 621(a), (b) (1982). Moreover, in the body of the statute, Congress specified that employers are not prohibited from making "differentiation . . . based on reasonable factors other than age." 29

U.S.C. § 623(f)(1) (1982). By expressly incorporating a defense that is implicit in the statute anyway, and that was not included in the analogous provision of Title VII, *see* 42 U.S.C. § 2000e-2(e) (1982), Congress further highlighted its concern that older workers be evaluated objectively on the basis of their performance.[1] Apparently cognizant that the aging process can affect capability, Congress drafted the ADEA to distinguish carefully between those employment decisions that are arbitrary and those that are performance-related.[2]

The legislative history of the ADEA also demonstrates that Congress was aware of the substantial differences in the types of discrimination addressed by the ADEA and Title VII. In 1964, when drafting Title VII, Congress decided against including age as one of the categories of prohibited discrimination, and instead ordered the Secretary of Labor to undertake a study of age discrimination in

---

[1]In committee hearings, Secretary of Labor Wirtz emphasized the significance of this addition:

> It is made clear throughout the Bill, and identified specifically in Section 2(b) [29 U.S.C. § 621(b) (1982)] that the prohibition is of "discrimination" in the sense of "*arbitrary* age discrimination." This is reflected particularly in Section 4(b) [29 U.S.C. § 623(f) (1982)].

Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 36, 39 (1967) (emphasis in original).

[2]*See* Note, The Cost of Growing Old: Business Necessity and the ADEA, 88 Yale L.J. 565, 568 (1979); Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 380-81, 383-84 (1976). *See also* Rodriguez v. Taylor, 569 F.2d 1231, 1236-37 (3d Cir. 1977) ("Age concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts.")

employment. *See* 42 U.S.C. § 2000e-14 (1970). Completed in 1965, that study unambiguously concluded that there was "no evidence of prejudice based on dislike or intolerance for the older worker." U.S. Dept. of Labor, *Report to the Congress on Age Discrimination in Employment Under Section 715 of the Civil Rights Act of 1964* at 6 (1965). Congress was certainly aware of this conclusion during the debate on the ADEA, recognizing, in the words of one representative, that "age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry." 113 Cong. Rec. 34742 (1967) (Rep. Burke).[3] Rather than amend Title VII—a statute dealing with discrimination arising from bigotry—so as to incorporate a ban on age discrimination,[4] Congress enacted a separate statute to deal with the problems created by irrational misconceptions about the ability of older workers. This history suggests that Congress did not intend that the courts rely on the same strong suspicions of employer motives justified in Title VII litigation.[5]

II.

ADEA's separate purpose and origins suggest that the *McDonnell Douglas* test should be tailored with the distinctive character of age discrimination in mind. The

---

[3]*See also* 113 Cong. Rec. at 34752, 31254 (remarks of Rep. Dwyer and Sen. Javits); *Senate Hearings, supra* note 1, at 22.

[4]The idea of extending Title VII protection to older workers was unsuccessfully advocated both in 1967, *see* 1967 *Senate Hearings, supra* note 1, at 29, 35 (statements by Sens. Smather and Murphy), and again in 1974, when two such bills amending Title VII died in committee. *See, e.g.*, H.R. 16972, 93d Cong., 2d Sess. (1974), 120 Cong. Rec. H9782 (Oct. 1, 1974); H.R. 17383, 93d Cong., 2d Sess. (1974), 120 Cong. Rec. H10598 (Oct. 15, 1974).

[5]*See generally* Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 852-54 (1982); Note, *ADEA, supra* note 4, 90 Harv. L. Rev. at 381-84.

Supreme Court has declared that the *McDonnell Douglas* test "was not intended to be an inflexible rule," *Furnco Construction v. Waters*, 438 U.S. 567, 575 (1978), or to be "rigid, mechanized or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience. . . ." *Id.* at 577. Although the test has been developed by the Supreme Court in Title VII case law only, I believe it is appropriate, in view of the difficulty of proving age discrimination directly, to use this analytic framework in ADEA discriminatory treatment cases. But inasmuch as the ADEA and Title VII do not address identical problems, I believe it is a mistake to transpose, completely and uncritically, all the details of Title VII analysis into the area of age discrimination.

Underlying the *McDonnell Douglas* test is the presumption that unexplained actions by an employer are discriminatory. In the context of race discrimination, the *Furnco* Court explained that

> we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577 (emphasis in original).

The *Furnco* presumption benefits a plaintiff at both the first and third steps of the *McDonnell Douglas* test. Assisted by the suspicion that accompanies unexplained employer actions, the plaintiff may establish a *prima facie*

case simply by showing membership in the protected class, qualification for the job, and unfavorable treatment in comparison with someone outside the protected class. But once the employer comes forward with evidence that the discharge was motivated by a legitimate, nondiscriminatory reason, the plaintiff may respond with indirect proof of discrimination, aided again by the *Furnco* suspicion of employer motive. If the plaintiff successfully proves that the employer's explanation is not worthy of credence, the factfinder is permitted to infer that the nondiscriminatory reason for the discharge was in fact only a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981); *see also U.S. Postal Service Board v. Aikens*, 103 S. Ct. 1478, 1481 (1983).

Because this indirect method of proving discrimination rests squarely on the presumption of invidiousness explained in *Furnco*, a court should not—if it is to be consistent with the logic of the *McDonnell Douglas* test—evaluate a pretext claim in an ADEA case in exactly the same fashion as in a Title VII action. In examining employment decisions affecting blacks or women, courts may logically suspect that even the decisions supported by reasonable factors other than race or sex may also have been tainted by hostility towards the protected class. An equally strong suspicion is not justified in an ADEA case. As the Supreme Court has noted, albeit in a constitutional case,

> [W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on

> the basis of stereotyped characteristics not truly indicative of their abilities. . . . [O]ld age does not define a "discrete and insular" group, in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span.

Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (citations omitted). *See also Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975).

The weaker presumption of bias in an age case does not undermine the usefulness of *McDonnell Douglas'* three-step allocation of the evidentiary burden. It does, however, suggest that proof of pretext at the third step of the analysis should be measured in light of the distinctive character of age discrimination. Thus I believe that when an employer shows that an ADEA claimant was selected for layoff because of performance, the claimant's rebuttal evidence of pretext should be evaluated with greater care than in a Title VII action.[6] Our intuitive understanding of

---

[6]Although our Court has applied *McDonnell Douglas* to ADEA claims, we have not had occasion to define the quantum or character of evidence necessary to prove pretext at the third step of the analysis. *See* Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980). *Massarsky* is suggestive on this issue, pointing out that a finding of pretext

> would have been warranted had [the plaintiff] established that the Company's purported policy was merely a post-hoc rationalization or a policy that had been adopted specifically for the purpose of concealing discrimination on the basis of age.

706 F.2d at 119. *Massarsky's* ultimate holding, however, simply affirms a jury's determination that the plaintiff failed to rebut the employer's valid, nondiscriminatory explanation for its decision. The Court's other

(Continued on next page)

bigotry supports an inference of pretext from virtually any defect in an employer's explanation of a decision to disfavor a member of a Title VII protected class. I do not think we should be as quick to infer pretext in an ADEA proceeding.

III.

The district judge in this case provided a statement of the governing law that would have been completely proper in a Title VII suit. He clearly explained the indirect method of proof at the third step of *McDonnell Douglas* and correctly held that pretext may be inferred if the employee can prove that "the employer's proffered explanation is unworthy of credence." *Duffy v. Wheeling Pittsburgh Steel Corp.*, No. 81-0601, slip op. at 11 (E.D. Pa. Sept. 30, 1983). But in analyzing Duffy's pretext claim, the district court not only failed to acknowledge the differences between proof of pretext in the ADEA and Title VII settings, but in effect reversed the logic of these differences, and inferred pretext more readily than would be proper even in a Title VII action. Thus, in my view, the district court found pretext on the basis of evidence that would be inadequate under any antidiscrimination statute, Title VII or otherwise.

(Continued)
discussion of *McDonnell Douglas* in the ADEA context, *Smithers*, addresses only the ultimate burden of proof, *not* the intermediate burden at the third step of the analysis. *Smithers* makes clear that an ADEA plaintiff bears the ultimate burden of proving that "age was somehow determinative." 629 F.2d at 898. Thus, neither *Massarsky* nor *Smithers* reach the question whether proof of pretext in an ADEA case should be evaluated in the exact manner as such proof in a Title VII claim.

A.

To rebut Duffy's *prima facie* case. W-P came forward with evidence that for 25 years, Duffy had been no more than an adequate salesman. Duffy's performance did not affect his job status until the deterioration of the steel market forced a drastic streamlining of operations.

When he was discharged in May 1980, Duffy was a "line salesman," the same position he had held since beginning with W-P in 1955. He had received only three "merit increases" in pay during his 25-year tenure, the last of which was awarded in 1970. During the last four years when salesmen in the Philadelphia District received written evaluations (1974-77), *see* App. at 308, Duffy was reported to be "well liked" by his customers and coworkers, but lacking in "follow up," "creative effort," "self start[ing]," "aggressive[ness]," "planning," "initiative," "in depth selling," "territory coverage" and "volume of work." *See* App. at 340-347. Described as "complacent" and criticized for the "few accounts [he] handled," App. at 344, Duffy was rated in every report as having no potential for advancement. *See* App. at 340-47. Duffy's immediate supervisor testified that Duffy's job performance showed no substantial change through 1980 and that the reports accurately describe Duffy's work. *See* App. at 291, 206-11.

Nonetheless, the district judge determined that W-P's explanation for discharging Duffy was "unworthy of belief and a mere pretext." Slip op. at 12. To support his finding of pretext, the judge looked to two types of evidence: (1) a chart indicating the tons of steel sales per year attributable to each salesman which proved, according to the court, that Duffy's performance was—"by objective criteria"—"superior to that of the younger men retained," *id.* at 6, 13; and (2) "inconsisten[t]" and "not credible" testimony by

various W-P executives which, according to the court, demonstrated that W-P management did not in fact believe that Duffy's performance was inferior. *Id.* at 12-13. I believe that the district judge's evaluation of this evidence reflects a basic misunderstanding of proof of pretext in a discriminatory treatment case.

B.

Insofar as an independent evaluation of a worker's performance is necessary in order to discover an employer's motive for a layoff, courts should not assume that objective evidence of performance reveals self-evident conclusions. It is essential that the proponent of performance evidence provide some basis for measuring the business significance of that data.

Contrary to this teaching, the district judge in this case attempted to evaluate the "objective criteria" of Duffy's performance exclusively on the basis of his independent and somewhat perplexing interpretation of a chart showing the tons of steel sold by each salesman in the Philadelphia District.[7] Despite the data's considerable ambiguity, the

---

[7]The tonnage sales chart provides scant support for the district judge's finding that Duffy was a "superior" salesman. During 1979-80, the three line salesmen working out of the Philadelphia office were credited as follows:

	1979	1980
Duffy (age 59, discharged)	52,575	17,889*
Sweeney (age 32, discharged)	46,690	19,944*
McConegly (age 26, retained)	75,458	36,672

* Reflects ½ year.

If the chart shows anything—and I have considerable doubt whether it does—it suggests that W-P correctly chose to retain only McConegly in the Philadelphia office.

(Continued on next page)

judge apparently evaluated the chart without the assistance of any record testimony indicating its business significance.[8] Absent such explanatory testimony, reliance on the chart was misplaced.

C.

Aside from the sales chart, the only other evidence cited by the district judge to support his finding of pretext was testimony he viewed as "inconsisten[t]" and "not credible." Slip op. at 12. While inconsistent and incredible testimony is relevant in a discriminatory treatment case, not every discernible variance in testimony by the executives of an employer is probative of pretext. In this case, the evidentiary defects cited by the district judge were, as a matter of law, not relevant to Duffy's pretext claim.[9]

(Continued)

Contrary to the majority's suggestion, the district judge did not attempt to explain his interpretation of the chart by noting that in 1979, McConegly's sales "included a large, unique account which was credited to McConegly's record although the transactions occurred through the Pittsburgh office, without McConegly's participation," and that in 1980, "Duffy had a higher monthly sales average than McConegly." *See* Maj. Op. at 9. This explanation for discounting the apparent significance of McConegly's tonnage sales was suggested in Duffy's proposed findings of fact, *see* App. at 356, 388-89 (Proposed Finding #17), but never accepted by the district court. Whatever the proper interpretation of this chart, I believe that the ambiguity in McConegly's data demonstrates the inherent unreliability of this chart in its current, unexplained form.

[8]For example, the chart does not show how many new accounts were developed each year. Nor does it give any indication of the number of long-established, major accounts contributing to each salesman's total. Finally, the chart provides no information on whether a salesman working out of the Atlanta, Charlotte, or Richmond offices of the far-flung Philadelphia District could be expected to sell as much as salesmen like Duffy who were working in Philadelphia proper.

[9]Thus it is not suggested that there should be a *de novo* review of the district court's credibility determinations. That task, as the majority

(Continued on next page)

The one item of incredible testimony cited by the district judge was W-P's explanation for its failure to consult Duffy's immediate supervisor, the district sales manager for the Philadelphia District, prior to selecting Duffy for the layoff. The judge found it "not credible" that W-P "did not want to put [the district sales manager] in the difficult position of trying to protect his district or his employee friends." Slip op. at 12. This evidence would be significant if it suggested that Duffy had been chosen for layoff by a different procedure than that used for the young employees discharged. Here, however, the judge failed to mention the uncontradicted evidence that *no* district sales managers were consulted during the May 1980 layoff. App. at 240-42.

Most of the "inconsistencies" relied on by the district judge were found in evidence that neither Duffy nor his supervisor were told that "performance" was the reason for the discharges, even though W-P management intended that this be explained to all discharged employees. Slip op. at 11-12. Such evidence surely suggests an effort, perhaps an unduly solicitous one, to avoid adding insult to injury in Duffy's discharge. Perhaps it also evinces the sort of bureaucratic sloppiness one would expect in a hastily-implemented excision of 15 percent of a huge organization. However, absent some evidence suggesting that Duffy's discharge was handled differently from that of the younger salesmen who were also discharged, W-P's organizational "glitches" are not probative of pretext for age discrimination.

(Continued)
observes, is delegated to the trial judge. Rather, my concern is purely legal—that is, what types of evidence are legally sufficient to show pretext.

A final inconsistency relied on by the district judge was the fact that Frank McElhinney, one of the three general managers responsible for selecting Duffy for the layoff, "could not recall what [Duffy's] performance was in the 9 month period" before his discharge. *Id.* op. at 12. The court ignored, however, the fact that McElhinney could not recall many details of the decision to fire employees both older and younger than Duffy, *see* App. at 258-80, a fact that is not surprising in view of McElhinney's position as general manager of W-P's entire Eastern Division, App. at 133-34, which included the huge Philadelphia District as only one of its sales regions. App. at 234.

Nowhere in the district court's opinion or in the record is there any evidence suggesting that the negative evaluations of Duffy should not be trusted. Nowhere is there any evidence suggesting that W-P management did not in fact believe that Duffy was only a minimally adequate salesman. To support a finding of pretext, Duffy should have been required to come forward with more than evidence of careless communications and forgetfulness.

D.

As additional support for the finding of pretext, the majority stresses that W-P discharged the four oldest and most highly paid salesmen in the Philadelphia District. *See* Maj. Op. at 4-5, 8.[10] To infer pretext from this evidence of impact, however, is to assume that an unbiased evaluation of performance will never produce effects that correlate with age. Ths majority's reliance on this unsubstantiated assumption seems particularly improvident in the present

[10]The discharged salesmen were Patrick Sweeney (age 32), Jack Mickle (age 53), Doug Duffy (age 59), and Lynn McCutcheon (age 61).

case, since the district judge did not rely on the impact evidence in his analysis of the pretext issue. *See Duffy, supra,* slip op. at 12-13. Indeed, the district judge expressly precluded Duffy from presenting statistical testimony on the impact data in part because:

> The expert's report presupposes equality of all factors other than age. As the testimony revealed, however, all other factors, particularly job performance, were not equal. Thus, the analysis is not probative.

App. at 357-58 (citations omitted). To be sure, a proper statistical analysis of the impact evidence could be very helpful on the issue of pretext.[11] But in its present form, without any effort to determine the age-distribution that would be expected from a bias-free decision, the impact evidence is devoid of probative value.

IV.

There can be no doubt that the entire steel industry, and W-P in particular, faced a crisis in May 1980. The pivotal question in this case is whether, despite his lacklustre record as a salesman, Duffy was included because of his age in the 15 percent laid off by W-P. As I see it, Duffy's evidence purporting to show pretext is, without some additional information, lacking in probative force. In reaching the opposite conclusion, the district judge not only omitted the more careful scrutiny of Duffy's pretext evidence that is required in an ADEA lawsuit, but in fact found pretext

---

[11]In Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3860 (May 29, 1984), ADEA plaintiffs showed that they were all over forty, that they were all terminated, and that all but one of them were replaced by men under forty. Yet when this impact evidence was subjected to statistical analysis, the expert concluded that "age could neither be ruled in nor ruled out statistically as the factor leading to the discharges." 714 F.2d at 565.

from a record that would be insufficient even under Title VII. Because I believe that Duffy failed to prove that W-P's claim of poor performance was a pretext for age discrimination, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

DOUGLASS M. DUFFY

v.

WHEELING PITTSBURGH STEEL CORP.

Civil Action
No. 81-0601

MEMORANDUM OPINION AND ORDER

BECHTLE, J. SEPTEMBER 30, 1983

This Memorandum Opinion represents the Court's findings of facts and conclusions of law in respect to the within proceeding under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1975) ("ADEA").

I. Findings of Fact and Conclusions of Law

The claim arises as an action for declaratory relief, injunctive relief, and damages to redress the deprivation of rights secured to plaintiff by the ADEA. Plaintiff seeks: 1) reinstatement; 2) back pay plus benefits to be computed using his last annual salary plus benefits, adjusted upwards by a yearly bonus plus cost of living; 3) liquidated damages; 4) costs; and 5) attorney's fees. The Court's jurisdiction is invoked under 28 U.S.C. § 1343 (Supp. 1983). Trial in this matter took place without a jury on February 7, 8, and 9, 1983, after which the parties filed their briefs and the Court heard argument. Upon consideration of the record before it, the Court finds as follows.

The plaintiff, Douglass M. Duffy, is a 58 year old male citizen of the United States and resident of the Township of East Whitland which is within the County of Chester within the Commonwealth of Pennsylvania. The plaintiff has been a citizen and continues to be a citizen of the Commonwealth of Pennsylvania.

Defendant Wheeling Pittsburgh Steel Corporation ("Company") is a foreign corporation (Delaware corporation) doing business in the Commonwealth of Pennsylvania at the principal address of 1900 Four Gateway Center within the City of Pittsburgh, within the County of Allegheny within the Commonwealth of Pennsylvania. The defendant has continuously been and does employ more than fifteen (15) people in the normal course of its business.

Since its formation in 1968, Company has continuously been and is now an employer engaged in an industry effecting commerce who has twenty (20) or more employees within the meaning of Section 630(b) of ADEA, 29 U.S.C. § 620(b) (1975).

Plaintiff is a member of the class protected by the ADEA.

All conditions precedent to the issuing of this lawsuit have been fulfilled.

Plaintiff was hired by Pittsburgh Steel Corporation (defendant's predecessor) in February of 1955 as a salesman in the Construction Products Division. (Duffy Dep. designated portions 10-14). In 1960 or 1961, all of Pittsburgh Steel's salesmen were consolidated into one sales department. On or about December 5, 1968, Pittsburgh Steel Company and Wheeling Steel Company merged to form W-P Steel. (Def. Answers to Pltf. Interrog., Second

Set. No. 1). Throughout the entire period of his employment with defendant, plaintiff remained a general line salesman in the Philadelphia District Office of defendant's Commercial Department and his duties and responsibilities remained essentially the same throughout that period. (Duffy Dep. 13-14, 17-19).

In the Spring of 1980, Cornel Bolog, Commercial Vice-President of defendant, in conjunction with Dennis Carney, President and Chief Executive Officer, decided to effectuate a 15% reduction in defendant's employment force due to the generally weak economic conditions in the steel industry. (Tr. 3-33 to 3-35; Bolog Dep. 25). As part of this reduction, defendant reduced its sales force. Many sales positions were either eliminated or consolidated. Twenty-three positions in the sales department were eliminated, consisting of eight salespersons, four managerial persons, and eleven support personnel. Thus, twenty-three terminations in the department occurred in the spring of 1980 as contemplated by management. (Tr. 3-48). The plaintiff was terminated as part of this program on May 31, 1980, at age 59. (Tr. 1-46, 1-29). Plaintiff mantains here that this termination was in violation of the ADEA.

The Court finds that plaintiff's termination was part of a decision reached by Carney, as president, and Bolog, then vice-president in charge of sales, to reduce W-P Steel's sales force by 15%. (Bolog Dep. 31 and 32; Tr. 3-34 and 3-35). Bolog in consultation with three general sales managers decided whom to fire (Bolog Dep. 25-32). In plaintiff's case, his general manager, Frank McElhinney, based his recommendations to Bolog upon information received over a period of time from McElhinney's district managers, such as plaintiff's district manager, Clyde Shelton. (Tr. 3-39). The district managers are the immediate supervisors

of the salesmen, the chain of command being salesmen, district manager, general sales manager, vice-president, president. (Bolog Dep. 73). McElhinney testified that in assessing the information received from the district managers and in reaching the termination decisions he used subjective rather than objective criteria. (Tr. 3-41, 3-45, 3-57, 3-58).

Defendant maintains that Cornel Bolog, Frank McElhinney, General Manager for the Eastern District, and Clyde Shelton, Philadelphia District Manager, made the decision to discharge plaintiff (Defendant's Answers to Plaintiff's Interrogatories—First Set, No. 32; Tr. 3-10). McElhinney admitted, however, that he did not request direct input from Shelton regarding the plaintiff's termination. (Tr. 3-39; McElhinney Dep. 39). At trial, McElhinney said that Shelton did not make any recommendation that was considered by Bolog. (Tr. 3-85).

Bolog stated that, to him, the key to deciding which salesmen to terminate was performance (Bolog Dep. 25-27, 39 and 45), and that he insisted each person being terminated be told why he was being terminated, that there was good and sufficient cause. (Bolog Dep. 45). Shelton was not consulted on whether plaintiff should be terminated even though he knew the most about plaintiff's performance. (Shelton Dep. 22 and 60; Tr. 3-127 - 3-130). Shelton was not instructed to tell plaintiff his termination was because of his performance. (Shelton Dep. 18 and 37; Tr. 3-127). At McElhinney's direction, Shelton told plaintiff on May 22, 1980, that he was being fired for economic reasons. (Shelton Dep. 18 and 37; Tr. 1-45). In the week after he was notified of his dismissal, plaintiff asked Shelton on several occasions why he was dismissed while two younger salesmen, John McConegly, age 26, and Rich Walker, age

23, were not. Shelton told him that his dismissal was because of economics. Shelton had no idea, and never told plaintiff, that his termination had anything to do with performance. (Shelton Dep. 17-19, 21, 36, 37 and 59; Tr. 3-128 and 3-131). Shelton wrote plaintiff an extremely favorable letter of recommendation after he was dismissed. (Ex. P-13; Tr. 3-122). Nicholas Weldon, Vice-President for Personnel of W-P Steel, told plaintiff in June, 1980, in response to a direct question by plaintiff whether his performance had been a factor in his discharge, that the discharge was an economic decision unrelated to his performance. (Tr. 2-8).

Defendant did not tell plaintiff that it maintained his discharge was based on comparative performance until after plaintiff filed a complaint. (Tr. 2-43 and 3-120 - 3-121). Despite company policy, plaintiff was not evaluated yearly, had not been evaluated since 1977, and was not even told he had been evaluated in 1977. (Tr. 1-42; 3-134 - 3-135). Neither McElhinney nor Bolog reviewed any of plaintiff's evaluations before terminating him and neither was aware he had not been evaluated for three years. (Bolog Dep. 51; McElhinney Dep. 42, 45). The salesmen younger than plaintiff retained in the Philadelphia District (Walker and McConegly) had never been evaluated before May of 1980. (Tr. 3-128, 3-130). McElhinney never discussed the relative performance of the Philadelphia salesmen with Shelton prior to the terminations, despite Shelton's superior first-hand knowledge of that information. (Tr. 3-127 - 3-130). By the objective criteria identified by defendant, plaintiff's performance as a salesman was

superior to that of the younger men retained. (Ex. P-19[1]—tonnage sales). It is clear, at the time of plaintiff's discharge in May of 1980, that McConegly's performance was at best an unknown quantity, McConegly having only been a salesman for a year and a half. (Tr. 3-129).

Of the five salesmen and one assistant sales manager in plaintiff's district (the Philadelphia District), defendant terminated the four oldest and the four most highly paid salesmen. (Exs. P-22, P-23, P-25, P-26, P-27, and P-44). The initial decision was to dismiss only the oldest three salesmen who were McCutcheon, age 61; plaintiff, age 59;

[1] PHILADELPHIA DISTRICT
SHIPMENTS BY SALES REPRESENTATIVE

	Age	1977	1978	1979	1980
Office		16,192	17,468	22,410	47,413
Dave Parrish	33	62,993	102,188	42,589	0
Jack Mickle	53	0	19,252	40,992	15,340
Ronald Ryan	48	0	0	0	19,567
Ed Friedrichs	50	0	0	0	17,509
Clyde Shelton	46	9,955	17,536	16,867	45,692
John McConegly	26	0	0	75,458	36,672
Rich Walker	23	0	0	1,857	9,571
Lynn McCutcheon	61	0	7,727	12,494	3,082
John Matthews	33	7,313	9,429	10,704	0
Salesman Not On File (Adjustments)		0	0	8	213
Doug Duffy	59	25,819	51,602	52,575	17,889***
Patrick Sweeney	32	31,403	33,209	46,690	19,944
R. F. Niggel	(N/A*)	97	0	0	0
Harry Buchanan	(N/A*)	0	189	0	0
Don Eikey	47	0	7,858	0	0
Don Weber	30	0	1,601	0	0
Total		153,771	268,058	322,644	232,892

*N/A = not available from record
*** reflects ½ year

and Mickle,[2] age 53. (Tr. 2-2 - 2-3, 3-42). The two salesmen retained, McConegly and Walker, were age 26 and 23 respectively. (Tr. 2-2 - 2-3; Ex. P-44). Plaintiff and the other nine men over 50 terminated in May and June of 1980, were paid substantially higher salaries than the younger men retained, and the cost of their insurance, pensions and social security payments was greater. (Shutt Dep. 17 and 18; Exs. P-22 - P-27 and P-44).

With 25 years experience in the company as a steel salesman, plaintiff was qualified for his position and was qualified to cover any of the sales territories in the company. Both McElhinney and Shelton agreed that plaintiff was completely competent as a salesman and well liked by his customers. (Tr. 3-38, 3-40, 3-114 - 3-115).

Shortly before plaintiff's termination, Shelton asked him how old he was and how long he had been with defendant and for information from which Shelton could determine if plaintiff was eligible to retire on a pension. At the same time, Shelton told plaintiff that he thought Bolog soon would eliminate some of the sales force. (Tr. 2-8 - 2-9). In May of 1980, when Bolog told William Shutt, age 59, the District Manager for the Pittsburgh District, that he was being terminated, Bolog gave the following reasons: "They were going to have to cut back in the Sales Department and were anxious to get younger and more aggressive people in the field." (Shutt Dep. 11).

On the question of damages claimed by the plaintiff, the evidence shows that the plaintiff was earning $2,375.00 per month at the time he was discharged (Ex. P-14), and that the salesmen at defendant's company received a flat

---

[2]Although Mickle's title was Assistant Sales Manager, in fact he was a salesman. (Tr. 2-14, 2-15 and 3-94).

cost of living increase of $132.00 on February 1, 1981. (Exs. P-25 and P-27). The evidence also shows that defendant contributed to a thrift plan, a savings program in which plaintiff participated. Defendant's contributions on plaintiff's behalf totaled $46.00 per month. (Tr. 2-23 - 2-24; Ex. P-14). In addition to his salary, plaintiff was receiving the following benefits at the time of his termination: life insurance, health insurance including dental insurance; contributions to the Wheeling Pittsburgh Steel Thrift Plan; and use, maintenance, biannual replacement of and gas for a car which he used for personal as well as business purposes. (Exs. P-14, P-15 and P-16; Tr. 2-20 -2-24). Since the termination, plaintiff has spent $4,051.00 for Blue Cross-Blue Shield Insurance and $300.00 for medical and dental bills which defendant's plan would have covered. (Tr. 2-20 and 2-21). Further, plaintiff has spent $7,114.00 to replace the rental car including gas and maintenance. (Tr. 2-21 - 2-23). Plaintiff has, therefore, spent a total of $11,465.00 to replace those benefits lost since his termination on May 31, 1980.

II. Discussion

The Age Discrimination in Employment Act makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ." 29 U.S.C. § 623(a)(1).

In order to recover under the ADEA, a plaintiff must prove by a preponderance of evidence that age was "a determinative factor" in the employer's decision. *See Smithers v. Bailar,* 629 F.2d 892 (3d Cir. 1980); *Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); *Cleverly v.*

Western Electric Co., 594 F.2d 638 (8th Cir. 1979); *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978); *Laugesen v. Anaconda*, 510 F.2d 307 (6th Cir. 1975). Plaintiff need not prove that age was the employer's sole or exclusive consideration but must prove that "age made a difference" in that decision. *Smithers, supra*, 629 F.2d at 898.

There is no burden upon an employer of proving that a particular employment decision affecting the employee was a matter of sound business judgment. An employer may hire or fire/demote or promote any employee on the basis of purely subjective reasons, even if such reason is shortsighted or narrowminded, as long as age is not a determinative factor in that decision. *See Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921-22 (2d Cir. 1980); *Loeb, supra*, 600 F.2d at 1012. However, the fact that an employer can demonstrate that an employment decision was based upon sound business reasons will not preclude liability under the ADEA if the employee can prove, nevertheless, that age was a determinative factor or that the reasons proffered by the employer are pretextual.

A plaintiff can establish a prima facie case of old age discrimination using statistical information, direct evidence of discrimination and/or circumstantial evidence. One method of establishing a prima facie case of discriminatory discharge, which has been approved by the Third Circuit Court of Appeals, is to prove by a preponderance of evidence: (1) that the plaintiff was within the protected age group; (2) that the plaintiff was qualified for the position; (3) that the plaintiff was removed from the position; and (4) that the position was filled by a younger person. *Smithers, supra*, 629 F.2d at 894-95. These guidelines, borrowed from the Supreme Court's decision in *McDonnell*

Douglas v. Green, 411 U.S. 792, 802 (1973), a Title VII action, permit an inference of discriminatory conduct because the employer is presumed to have acted upon the impermissible factor of age, in the absence of another explanation. *Id.* at 895 (*citing Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978)).

Once the plaintiff succeeds in establishing a prima facie case under the *McDonnell Douglas* guidelines, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981) (*quoting McDonnell Douglas, supra,* 411 U.S. at 802). The inference of discrimination dissolves when the employer shows a legitimate, nondiscriminatory reason for the conduct. The burden in this regard is not an onerous one. The burden that shifts to the defendant is "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine, supra,* 450 U.S. at 254. It is enough for the employer to set forth, through the introduction of admissible evidence, the reasons for the employee's rejection. Once this "burden of production" has been satisfied, the plaintiff, who retains the "burden of persuasion" throughout the litigation, must convince the trier of fact that (1) a discriminatory reason more likely motivated the employer or (2) the employer's proffered explanation is unworthy of credence. *See United States Postal Service Bd. of Governors v. Aikens,* ___ U.S. ___, 103 S.Ct. 1478, 1482 (1983); *Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 256.

The Court finds that plaintiff presented a prima facie case under *McDonnell Douglas* which justified the inference that age was a determining factor in his termination. The evidence established:

(1) plaintiff was in the protected age group;

(2) plaintiff was qualified for the position;

(3) plaintiff was terminated; and

(4) the position was filled by a younger person.

Thereafter, defendant proffered the legitimate nondiscriminatory reason for plaintiff's discharge that (1) economic conditions in the steel industry forced a cutback in personnel, and (2) plaintiff was selected for termination based on relative job performance.

The defendant's explanation, if true, would adequately rebut any inference of discrimination arising from the fact that the plaintiff was removed and replaced by a younger person. The Court has concluded, however, that plaintiff has proven that the defendant's explanation is unworthy of belief and is a mere pretext.

The evidence in this regard consists of a significant series of inconsistencies in defendant's testimony, as well as evidence that in fact plaintiff's comparative job performance was above average. Although performance was the stated reason that plaintiff was selected for discharge, the following emerges from the evidence:

(1) the person most familiar with plaintiff's performance, his supervisor Clyde Shelton, was never directly consulted by those who decided to fire plaintiff—Mr. Bolog and Mr. McElhinney;

(2) defendant's explanation for this, that it didn't want to put Mr. Shelton in the difficult position of trying to protect his district or his employee-friends, is not credible, and belies Mr. Shelton's demonstrated maturity and professionalism;

(3) Mr. Bolog testified that the sales managers were told to tell the individuals terminated why they were being terminated and that the reason was performance. "I *insisted* that they tell the individual why he was being terminated—that there was good and sufficient cause." [Dep. p.45—made part of the record on day 2 of the trial (Feb. 8, 1983).];

(4) Mr. McElhinney testified that he told Mr. Shelton that plaintiff was selected for discharge based on performance. (Tr. 3-87);

(5) Mr. McElhinney testified that he couldn't recall what plaintiff's performance was in the nine month period preceding the decision to terminate him;

(6) Mr. Shelton testified that he was never told that performance was the basis for plaintiff being selected for dismissal. (Tr. 3-128);

(7) despite direct questioning by plaintiff as to whether his performance was a factor in the termination decision, plaintiff was repeatedly told that the decision was based on economic factors only.

In view of the above, and considering plaintiff's sales record (Ex. P-19),[3] the Court has concluded that defendant's articulated nondiscriminatory reason for the discharge of plaintiff's performance was pretextual. Accordingly, the Court finds that plaintiff was discharged on the basis of his age in violation of the ADEA.

III. Damages

The Third Circuit has stated that the touchstone for fashioning a remedy in an age discrimination case is the make whole standard of relief. *Rodriguez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. den.,* 436 U.S. 913. "Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct of employers." *Id.* The Court is empowered to award appropriate legal and equitable relief including back pay, reinstatement and restoration of employee benefits. 29 U.S.C. § 626(b) (1975); 29 U.S.C. § 216(b) (Supp. 1983). *See Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (ADEA to be enforced according to the powers, remedies and procedures of the Fair Labor Standards Act). Back pay is measured by the difference between the salary an employee would have received but for a violation of the ADEA, and the salary actually received from other employment, less unemployment benefits. The relevant period for measuring back pay begins with the time of the loss of employment as a result of the violation and ends when the court enters judgment. Liquidated damages in an amount equal to the unpaid wages may be recovered if the violation is found to be "willful." *Wehr v. Burroughs Corp.,* 619 F.2d 276, 278 (3d Cir. 1980). Under the standard for willfulness set out in the Third Circuit's decision

---

[3]Exhibit P-19 is reproduced in full at fn. 1, *supra.*

in *Wehr*, "[i]t is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken or inadvertent".[4] *Id.*, 619 F.2d at 283.

Applying the above guidelines, plaintiff is entitled to back pay from May 30, 1980 until September 30, 1983, at a rate of $2,375.00 per month for the months up to February 1, 1981, and at a rate of $2,507.00 for the months thereafter. This amounts to $99,224.00 in lost wages. ((8 x $2,375.00) + (32 x $2,507.00)). The $132.00 per month increase after February 1, 1981, reflects a flat cost of living increase given to all of defendant's salesmen after that date. Additionally, plaintiff is entitled to contributions to defendant's thrift plan in the amount of $1,840.00 (40 x $46.00), and lost benefits as previously set forth in the amount of $11,465.00. Plaintiff's total lost wages and benefits thus equals $112,529.00. Additionally, in view of the willfulness standard set forth in *Wehr*, plaintiff is entitled to liquidated damages equal to his lost wages and benefits. Finally, upon review of the evidence adduced at trial, the Court has concluded that plaintiff should be granted reinstatement. Reinstatement is not a mandatory remedy. To grant or deny it lies within the trial court's discretion after a careful consideration of the particular facts of each case. *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982). In the case at hand, the Court finds

---

[4]The Court reads *Wehr* to hold that a violation is willful in any discriminatory treatment case, as opposed to a discriminatory impact case. Presumedly under an "impact" case, a violation could be willful if the use of facially neutral criteria was a mere pretext for purposeful discrimination based on age.

that there is nothing unique or unusual about either plaintiff's position as line salesman, or the particular circumstances existing at defendant company which would indicate that reinstatement is inappropriate. The Court notes that the testimony established instances of compliments to and apparent satisfaction with plaintiff by his superiors at defendant company. There is thus nothing of record which suggests that unconscionable difficulties would be presented as a result of plaintiff's reinstatement, and under the ADEA and the Court's equitable powers, plaintiff is entitled to be awarded this form of relief.

An appropriate Order shall be entered granting plaintiff back pay, restoration of benefits, and reinstatement. Attorneys fees, costs, and expenses shall also be awarded. 29 US.C. § 626(b) (1975).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

DOUGLASS M. DUFFY
v.
WHEELING PITTSBURGH STEEL CORP.

Civil Action
No. 81-0601

ORDER

AND NOW, TO WIT, this 30th day of September, 1983, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Judgment in the sum of $225,058.07 is *entered* in favor of plaintiff, Douglass Duffy, and against defendant, Wheeling-Pittsburgh Steel Corporation.

2. Defendant shall reinstate plaintiff to his former position within thirty (30) days of the date of this Order.

3. Plaintiff is directed to submit a petition for reasonable attorneys fees and costs and expenses within fifteen (15) days of the date of this Order. Thereafter, defendant shall have fifteen (15) days within which to file its objections thereto.

LOUIS C. BECHTLE, J.

APPENDIX C

United States Court of Appeals For The Third Circuit

No. 83-1776

DUFFY, DOUGLASS M.
Appellee

v.

WHEELING PITTSBURGH STEEL CORP.
Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges,* and COHEN, *District Judge* *

The petition for rehearing filed by appellant, Wheeling-Pittsburgh Steel Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

Circuit Judge

DATED: August 17, 1984

*Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX D

United States Court of Appeals For The Third Circuit

No. 83-1776

DUFFY, DOUGLASS M.

v.

WHEELING PITTSBURGH STEEL CORP.,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 15, 1984.

BY THE COURT

Circuit Judge

DATED: August 27, 1984